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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 MING CHU WUN,

11 Plaintiff,

12 v.

13 NORTH AMERICAN COMPANY FOR  
14 LIFE AND HEALTH INSURANCE, *et al.*,

15 Defendants.

Case No. 2:11-CV-00760-KJD-CWH

**ORDER**

16  
17 Before the Court is Defendant North American Company For Life and Health Insurance's  
18 ("North American") Motion to Dismiss (#14) and Defendant Ding-Ho Wang's Motion to Dismiss  
19 (#16). Plaintiff Ming Chu Wun has filed an opposition to these two Motions (#19) and Defendants  
20 have filed replies (## 20, 21).

21 **I. Background**

22 On May 13, 2009 Defendant Wang sold Plaintiff an annuity issued by Defendant North  
23 American. Wang and Plaintiff conducted much of the discussion of the annuity in the Chinese  
24 language. According to the Complaint, Wang promised Plaintiff that, *inter alia*, the annuity would  
25 pay an 8% contract bonus for each of the first 10 contract years in which a withdrawal was not made  
26 and that the minimum index growth cap for each fund would be 8%.

1 After the annuity was issued, Plaintiff discovered that it did not include the 8% bonus credit  
 2 that Wang allegedly promised her. The Complaint states that Wang represented to Plaintiff that the  
 3 bonus credit issue could be solved in various ways, but ultimately the issue was not resolved.  
 4 Additionally, Plaintiff avers that the index growth cap rates for the funds in the annuity are below the  
 5 8% that Wang promised to Plaintiff. Plaintiff asserts causes of action for: (1) securities fraud; (2)  
 6 deceptive trade practices; (3) fraud; (4) insurance bad faith; (5) breach of contract; (6) Breach of the  
 7 Implied Covenant of Good Faith and Fair Dealing; (7) breach of fiduciary duty; (8) tortious bad faith;  
 8 and, (9) negligent misrepresentation.

## 9 II. Discussion

### 10 A. Legal Standard For Motion to Dismiss

11 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
 12 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937,  
 13 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the  
 14 context of a motion to dismiss, means that the plaintiff has plead facts which allow “the court to  
 15 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. The Iqbal  
 16 evaluation illustrates a two prong analysis. First, the Court identifies “the allegations in the  
 17 complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal  
 18 conclusions, bare assertions, or merely conclusory. Id. at 1949–51. Second, the Court considers the  
 19 factual allegations “to determine if they plausibly suggest an entitlement to relief.” Id. at 1951. If the  
 20 allegations state plausible claims for relief, such claims survive the motion to dismiss. Id. at 1950.

### 21 B. Securities Fraud

22 “Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful for any  
 23 person ... [t]o use or employ, in connection with the purchase or sale of any security ... any  
 24 manipulative or deceptive device or contrivance in contravention of such rules and regulations as the  
 25 Commission may prescribe [.]” In re Daou Sys., Inc., 411 F.3d 1006, 1014 (9th Cir.2005) (quotation  
 26 omitted). Pursuant to section 10(b), the SEC promulgated Rule 10b–5, which makes it unlawful:

- 1 (a) To employ any device, scheme, or artifice to defraud,
- 2 (b) To make any untrue statement of a material fact or to omit to state a material fact  
necessary in order to make the statements made, in light of the circumstances under  
which they were made, not misleading, or
- 3 (c) To engage in any act, practice, or course of business which operates or would  
operate as a fraud or deceit upon any person, in connection with the purchase or sale
- 4 of any security.

5 17 C.F.R. § 240.10b-5.

6 To prove a violation of Rule 10b-5, a plaintiff must demonstrate “(1) a material  
7 misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a  
8 security, (4) transaction and loss causation, and (5) economic loss.” Zucco Partners, LLC v. Digimarc  
9 Corp., 552 F.3d 981, 990 (9th Cir. 2009). Section 3(a)(8) of the Securities Act exempts from its  
10 provisions “[a]ny insurance or endowment policy or annuity contract or optional annuity contract,  
11 issued by a corporation subject to the supervision of the insurance commissioner of any state” 15  
12 U.S.C. § 77c(a)(8). The Supreme Court has held that certain types of “variable annuities” with  
13 characteristics that make them operate like securities are not exempt from the Securities Act. SEC v.  
14 Variable Annuity Life Insur. Co., 359 U.S. 65, 71–72, 79 S.Ct. 618 (1959).

15 In her opposition to the Motion to Dismiss, Plaintiff argues that the annuity at issue was  
16 variable and thus falls outside the safe harbor. However, Plaintiff does not use the term “variable” in  
17 the Complaint and does not plead facts showing that the annuity she purchased was variable.  
18 Specifically, Plaintiff does not claim that the annuity lacked any guaranteed return – only that the  
19 return she received was less than she expected. She has not pled facts showing that payments were  
20 directly dependent on the performance of the investments that Defendant American made with her  
21 premiums. See, e.g. Malone v. Addison Ins. Marketing, Inc., (225 F. Supp2d 743, 750-751) (finding  
22 annuity was not variable when it had a minimum guaranteed return and did not hold money in  
23 separate account). Annuities that provide a guarantee in addition to excess interest based on a  
24 formula tied to an index are regulated by the Nevada Insurance Commissioner pursuant to NRS  
25 688A and are within the Exchange Act safe harbor. See Nevada Division of Insurance Report on  
26 Nevada Insurance Market, February 2011 at 19. Accessed on 3/12/12 at

1 <http://www.doi.nv.gov/sinfo/doc/InsuranceMktReportB.pdf>. Plaintiff has not pled facts showing that  
2 the annuity at issue is a security. Accordingly, her claim for violations of state and federal securities  
3 laws fails and is dismissed.

#### 4 C. Deceptive Trade Practices

5 The Nevada Unfair and Deceptive Trade Practices Act (“DTPA”), found at NRS 598 *et seq.*,  
6 prohibits a variety of fraudulent and unfair dealings in the course of conducting business. NRS  
7 598.0955(1)(a) provides exemption from the DTPA for “[c]onduct in compliance with the orders or  
8 rules of, or statute administered by, a federal, state or local governmental agency.”

9 Defendants argue that Plaintiff’s DTPA claim is barred because the Insurance Commissioner  
10 has exclusive authority over insurance carriers pursuant to NRS 57. See Brown v. State Farm Fire  
11 and Cas. Co., 2011 WL 2295162 (D. Nev. June 8, 2011) (finding no private right of action for breach  
12 of regulatory or administrative codes). Here, the conduct that is alleged in the Complaint –  
13 misrepresenting the terms of an annuity – is not “conduct in compliance” with NRS 57 or the rules of  
14 the Insurance Commissioner. Plaintiff is not suing pursuant to the regulatory or administrative  
15 codes, but under NRS 41.600(2)(e) which specifically provides a private right of action for violations  
16 of DTPA. See Weaver v. Aetna Life Ins. Co., 2008 WL 4833035, 4 (D.Nev. 2008) (denying motion  
17 to dismiss DTPA claim against insurance carrier). Since the alleged conduct does not constitute  
18 conduct exempt from the Deceptive Trade Practices Act the DTPA claim survives.

#### 19 E. Fraud and Negligent Misrepresentation

20 Fed.R.Civ.P. 9(b) provides that “[i]n alleging fraud or mistake, a party must state with  
21 particularity the circumstances constituting fraud or mistake.” The elements of intentional  
22 misrepresentation or common law fraud in Nevada are: (1) a false representation made by the  
23 defendant; (2) defendant’s knowledge or belief that the representation is false (or insufficient basis  
24 for making the representation); (3) defendant’s intention to induce the plaintiff to act or to refrain  
25 from acting in reliance upon the misrepresentation; (4) plaintiff’s justifiable reliance upon the  
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1 misrepresentation; and (5) damage to the plaintiff resulting from such reliance. Bulbman, Inc. v. Nev.  
 2 Bell, 825 P.2d 588, 592 (Nev.1992).

3 Plaintiff's complaint identifies that in approximately May of 2009 in Las Vegas, Wang acting  
 4 on behalf of North American, represented that the annuity he sought to sell Plaintiff would pay an  
 5 8% bonus credit and would have a minimum index growth cap rate of 8%. Plaintiff alleges that she  
 6 relied on these statements, that they were false, and that they caused her damage. Plaintiff adequately  
 7 states her claims for fraud and negligent misrepresentation.

#### 8 G. Breach of Contract

9 To state a claim for breach of contract in Nevada, a Plaintiff must demonstrate (1) the  
 10 existence of a valid contract, (2) that plaintiff performed or was excused from performance, (3) that  
 11 the defendant breached, and (4) that the plaintiff sustained damages. See Calloway v. City of Reno,  
 12 993 P.2d 1259, 1263 (2000).

13 The Complaint avers that Plaintiff and Wang, acting as an agent for North American, agreed  
 14 to certain terms of an annuity. Plaintiff claims that she performed her obligations under the parties'  
 15 agreement, but that Defendants "failed to honor the agreed upon and promised 8% bonus and 8%  
 16 index growth cap rate." (Compl. ¶ 93.) Plaintiff avers that these promises formed part of the  
 17 agreement between the parties. This claim as stated is sufficient to sustain a cause of action for  
 18 breach of contract against North American at this stage. However, Plaintiff has not pled facts  
 19 showing that Wang was a party to the agreement between Plaintiff and North American.  
 20 Accordingly, the Breach of Contract claim is dismissed as to Wang.

#### 21 H. Insurance Bad Faith

22 Nevada's definition of bad faith is (1) an insurer's denial of (or refusal to pay) an insured's  
 23 claim (2) without any reasonable basis and (3) the insurer's knowledge or awareness of the lack of  
 24 any reasonable basis to deny coverage, or the insurer's reckless disregard as to the unreasonableness  
 25 of the denial. Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Insurance Co., 863 F.Supp. 1237,  
 26 1244 (D.Nev.1994).

1 Plaintiff does not allege facts showing a refusal by North American to pay a claim without  
 2 any reasonable basis since North American is paying Plaintiff pursuant to the annuity. The  
 3 allegations of the Complaint are focused on the amount owed to Plaintiff and not a refusal to pay.  
 4 Further, the facts pled by Plaintiff do not demonstrate that North American's conduct constitutes a  
 5 knowing lack of reasonableness. Accordingly, the claim for bad faith is denied.

#### 6 I. Implied Covenant of Good Faith and Fair Dealing

7 To state a claim of breach of the covenant of good faith and fair dealing, plaintiff must allege:  
 8 (1) plaintiff and defendants were parties to an agreement; (2) the defendants owed a duty of good  
 9 faith to the plaintiff; (3) the defendants breached that duty by performing in a manner that was  
 10 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.  
 11 Perry v. Jordan, 900 P.2d 335, 338 (Nev.1995). In Nevada, an implied covenant of good faith and  
 12 fair dealing exists in every contract. Consolidated Generator-Nevada v. Cummins Engine, 971 P.2d  
 13 1251, 1256 (Nev.1998).

14 The Complaint avers that Plaintiff and Wang, acting as an agent for North American, agreed  
 15 to certain terms of an annuity but that Defendants failed to live up to the agreement. Specifically,  
 16 Plaintiff claims that her justified expectations were denied when North American "failed to honor the  
 17 agreed upon and promised 8% bonus and 8% index growth cap rate." (Compl. ¶ 93.) Accordingly,  
 18 the claim for breach of the implied covenant of good faith and fair dealing survives as to North  
 19 American. This claim fails against Wang because, as discussed *supra*, Wang was not in a contractual  
 20 relationship with Plaintiff.

#### 21 J. Breach of Fiduciary Duty

22 An insurance contract is a special contract that can be fiduciary in nature, but does not create  
 23 a fiduciary relationship. Martin v. State Farm Mut. Auto. Ins. Co., 960 F.Supp. 233 (Dist.Nev.1997).  
 24 The Nevada Supreme Court has affirmed that an insurer's duty to its policyholder is "akin" to a  
 25 fiduciary relationship; however, it also clarified that this conclusion "does not equate to the creation  
 26 of a new cause of action." Powers v. United Servs. Auto. Ass'n., 979 P.2d 1286, 1288 (Nev.1999).

1 Plaintiff argues that the Nevada Supreme Court created a cause of action for breach of  
2 fiduciary duty against an employer in Insurance Co. of the West v. Gibson Tile Co., Inc., 122 Nev.  
3 455, 134 P.3d 698 (Nev. 2006). In that case, which cites Powers approvingly, the issue was a jury  
4 instruction describing a fiduciary relationship, and not a cause of action for breach of fiduciary duty  
5 against an insurer. Since Nevada does not recognize this cause of action against an insurer or an  
6 insurance agent, the claim for breach of fiduciary duty fails.

7 K. Tortious Bad Faith

8 A claim for breach of the duty of good faith and fair dealing can be rooted in tort or contract  
9 law. This claim sounds in tort when a “special element of reliance or fiduciary duty” exists between  
10 the parties. Great Am. Ins. Co. v. Gen. Builders, Inc., 113 Nev. 346, 934 P.2d 257, 263 (1997).  
11 When such a relationship exists, tort recovery is appropriate if “the party in the superior or entrusted  
12 position” has engaged in “grievous and perfidious conduct.” Id. (quoting K Mart Corp. v. Ponsock,  
13 103 Nev. 39, 732 P.2d 1364, 1371 (1987)). Although tort liability for breach of the covenant of good  
14 faith and fair dealing is limited to “rare and exceptional cases,” the Nevada Supreme Court holds that  
15 the relationship between an insurer and an insured is one such case. Id.

16 Plaintiff’s claim fails against Wang because Nevada Courts have never recognized the  
17 required special relationship between an insurance agent and an insured. The Court has doubts about  
18 whether the allegations of the Complaint could plausibly rise to the level of “grievous and  
19 perfidious” conduct by North American required to support this cause of action. However, the Court  
20 cannot say as a matter of law, that Plaintiff failed to state a claim for Tortious Bad Faith against  
21 North American. Accordingly, the claim survives against North American.

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1 III. Conclusion

2 **IT IS HEREBY ORDERED THAT** North American Company For Life and Health  
3 Insurance's Motion to Dismiss (#14) is **GRANTED** in part and **DENIED** in part.

4 **IT IS FURTHER ORDERED THAT** Defendant Ding-Ho Wang's Motion to Dismiss  
5 (#16) is **GRANTED** in part and **DENIED** in part.

6 DATED this 15<sup>th</sup> day of March 2012.

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Kent J. Dawson  
United States District Judge